

CITY OF PULLMAN HEARING EXAMINER

RE: WAL-MART SUPERCENTER)	
DETERMINATION OF NON-)	
SIGNIFICANCE 04-21; SITE PLAN)	FINDINGS OF FACT
APPROVAL 04-26)	AND CONCLUSIONS
_____)	OF LAW AND DECISION

I. SUMMARY OF DECISION

Hearing Matters: Appeal of Determination of Non-Significance (DNS); and, appeal of Site Plan approval for construction of a Wal-Mart Supercenter.

Summary of Decision: Approve Site Plan, subject to revised conditions of approval. Deny appeal of DNS, subject to additional mitigating conditions.

II. FINDINGS OF FACT

1. The proposal consists of the application for site plan approval (submitted October 28, 2004) as revised, for the construction of a Wal-Mart Supercenter Store on a 28 acre site.

2. The site is located generally south of Bishop Boulevard where it intersects with Harvest Drive within the municipal boundaries of the City of Pullman, Washington.

3. The site is located generally in Section 8, Township 14 North, Range 45 E.W.M., of Whitman County, Washington.

4. The applicant is CLC Associates of Spokane Valley, c/o Dean M. Logsdon 12730 E. Mirabeau Parkway, Ste. 100, Spokane Valley, WA 99216. The site owner is S&W Land Company, PO Box 389, Colfax, WA 99111. Unless stated otherwise, reference herein to Wal-Mart shall include the applicant.

5. Pursuant to the State Environmental Policy Act (S.E.P.A.) a third revised Environmental Checklist was received on June 22, 2005, by the City of Pullman. On that same date the City of Pullman, by Mark D. Workman, Director of Public Works, issued a Notice of Preliminary DNS for the proposal. A final DNS was issued on August 25, 2005. Legal publication and mailing of notice relating thereto followed.

6. On September 7, 2005, the Pullman Alliance for Responsible Development, a Washington non-profit association timely appealed the DNS.

7. It is unclear from the record on what date formal site plan approval was given for the project. The latest date for which approval was given is September 22, 2005. An appeal of the site plan approval was also timely made by the Pullman Alliance for Responsible Development on or about October 3, 2005.

8. The Hearing Examiner conducted a consolidated public hearing on the site plan approval and the appeal of the DNS over a three day period, to wit: January 13, 20, and 26, 2006. The hearing was adjourned (continued) each day to a specific time and place. Proper notice was published and public notice given for distribution by the news media.

9. The Hearing Examiner conducted site visits, and visits of the surrounding neighborhoods, twice each day, above-identified and at various times. No member of the public or any party communicated with the Hearing Examiner during said visits.

10. The Hearing Examiner heard the proposal pursuant to Rules of Procedure established by the Hearing Examiner. The hearing was concluded on January 26, 2006, and the record remained open for written comments until the close of business that same day. No objection was voiced as to the procedures utilized except that one citizen suggested that testimony be altered between those in favor and those against the proposal. The procedures established by the Hearing Examiner were not changed in response thereto.

11. No objection was made as to the evidence presented or the qualifications of any witness identified as an expert.

12. Numerous persons testified both in favor and in opposition to the proposal. The testimony of expert witnesses was introduced by parties to the action and argument of counsel was heard. Legal memorandum were filed on behalf of the Appellants and Wal-Mart. The Appellants were represented by attorney Brian T. McGuin, Wal-Mart was represented by attorney Jack C. McCullough and Jessie Clawson. Attorney Laura D McAloon represented the City of Pullman.

Items in the Record

13. The Hearing Examiner takes notice of portions of the Pullman Comprehensive Plan, Zoning Code, Design Standards (2001 Edition), and other applicable development regulations, and prior land use decisions in the area.

14. The record includes the documents in the project file at the time of the public hearing, the documents and testimony submitted at the public hearing, and the items taken notice of by the Hearing Examiner. The record also includes a petition against the proposal and which incorporates a pledge not to favor the applicant with business.

15. No part of the record was objected to by any party to the proceeding.

Description of Site

16. The site is approximately 28.03 acres in size, and is undeveloped, currently utilized as farmland. The property generally slopes to the north, however, overall its described as hilly terrain sloping in all directions. The greatest slopes are between 25% and 30%. Commercial use is made of the general area and the site lies immediately north of a cemetery.

17. Seasonal wetlands are found on a portion of and adjacent to the site. The south fork of the Palouse River exists one-half mile to the east of the site. Fork Creek lies one-half mile to the west of site. A portion of the site contains jurisdictional wetlands.

18. Application was made for the proposal on October 28, 2004. Despite revisions made as a result of the planning process it would appear that the application was complete as of the date and accepted by the City of Pullman.

Description of Proposal

19. To construct a 223,000 square foot Wal-Mart Supercenter including grocery, general merchandise, pharmacy, garden center, tire and lube service and attendant parking. The application suggests that space for a future gas station be provided. However, the development of a gas station was not identified as a certainty nor have specific plans been submitted to the City of Pullman. The proposal identifies the extension of Fairmont Drive by the proponent including certain related traffic improvements.

Comprehensive Plan and Zoning Designations for Site and Neighboring Properties

20. The City of Pullman's Comprehensive Plan designates the site as commercial. Zoning is identified as General Commercial District (C-3). Neighboring properties are of commercial zoning and have been zoned for such for many years.

Land Use Restrictions

21. The General Commercial District (C-3) of the City of Pullman permits outright, subject to site plan review, the use proposed by Wal-Mart.

The Project's Sponsor and Business Plan

22. Wal-Mart is a large multi-national, multi-jurisdictional corporate entity, specializing in large "big box" stores, doing business in general merchandise and grocery sales. By estimation approximately one-third of all grocery items sold in the United States are purchased at Wal-Mart. Wal-Mart has significant expertise in the development of its outlets. It claims confidentiality over certain aspects of its business endeavors relating to economic expectations of its outlets and its supercenters. Wal-Mart, by its own admission, practices a form of cannibalism over competitors. On occasion Wal-Mart has closed outlets not performing to its profit expectations.

Traffic Impacts

23. Wal-Mart sponsored at least three Traffic Impact Analysis (TIA) which were developed with input from the Washington State Department of Transportation and a consulting traffic engineer engaged by the City of Pullman. The final TIA accepted by the City of Pullman is dated May, 2005.

The methodology of the final study was approved by the City of Pullman with assistance of C.V. Brown, P.E., consulting engineer and the Washington State Department of Transportation. Generally, a TIA involves some conjecture and estimation of new generated daily trips when added to current existing levels of traffic and thereafter allocated to roads and intersections impacted by the proposal.

24. The Institute of Traffic Engineers (ITE) Trip Generation Manual, 7th Edition, establishes a standard for calculating trip generation. Specifically, Land Use Code 815, Free Standing. Discount Code and Land Use Code 813, Free Standing Discount Store, Superstore are suggested as appropriate references for determining trip generation of a Wal-Mart Supercenter.

25. Wal-Mart is an experienced operator of its own supercenters throughout the country, and specifically within the State of Washington and neighboring towns in the State of Idaho. It has specific knowledge of its business operations with regard to both time and day of its customers. The City of Pullman has no corresponding knowledge or experience and the proposal will be the largest commercial construction project within the City of Pullman. The City of Pullman has existing burdens upon its existing roads in part based upon its typography and the fact that it is a college town. These factors render any TIA unreliable also because of seasonal fluctuation in population and attendance at college sporting events and activities.

26. Representatives of Wal-Mart introduced a transportation study dated April 7, 2005, and prepared by consultant DKS Associates of Portland, Oregon. The stated purpose of its introduction was to justify the accuracy of the Institute of Transportation Engineers Calculation for a Free Standing Discount Superstore (Category 813) by evaluating three stores in western Washington and Oregon. It was unknown whether the survey included super stores with free-standing gasoline stations. The study utilizes times, conditions, and days of travel which are somewhat different from times, conditions and days, in the TIA prepared

for the City of Pullman or which are typically utilized in TIA's. The traffic counts utilized in the DKS study were performed during the last week in February, 2005. The last week in February is not a peak time of year for calculating traffic impacts. Again, the City of Pullman may itself be somewhat of an anomaly because of existing limitations on its roadways and it being a college town. The DKS study qualifies itself by concluding that the Trip Generation Handbook provide methodologies for incorporating the local survey data into the national trip data.

27. Wal-Mart has stated that a free-standing gas station may be proposed in the future and which disclosure is required under the State Environmental Policy Act. The free-standing gas station is not a part of the present application but is included in the Wal-Mart TIA. Wal-Mart suggests that if built, the gas station will likely serve current customers of Wal-Mart and would not result in significant additional traffic impacts.

28. The proposal calls for the construction of approximately 1039 parking spaces.

29. The May, 2005, TIA states that 11,121 Average Daily Trips (ADT) would relate to the store and 2,023 ADT would relate to the service station. Peak afternoon volume for both would be 1,065 (Record 00233) or 899 for only the store.

30. The DKS study (Finding of Fact 26) identifies peak p.m. periods which average 789 total trips per hour although the Salem Store weekday count was between 5:00 and 6:00 p.m. The DKS study identifies an average count of 790 weekday peak hour p.m.

31. In December, 1994, Taylor Engineering, Inc., prepared a TIA for the Bishop Boulevard Shopko (Record 00689), a 78,000 square foot shopping center in proximity with the Wal-Mart's proposal. Peak p.m. hour trip generation totaled 519 (Record 00716), combined with a fast food restaurant it was forecasted that the proposal would generate 7,400 vehicle trips per weekday (Record 00716). The Shopko project is almost one-third the size of Wal-Mart's proposal.

33. Mr. C.V. Brown, PE, by letter of November 17, 2004, critiqued Wal-Mart's TIA of October 15, 2004 (1st TIA). At Record 00612, Mr. Brown calculated new arterial traffic generation as existing at three potential levels, to wit: 708, 950 and 647. He concluded that the more realistic level of new traffic to be 647. This amount is less than the peak rates identified with the DKS study and in terms of square foot size comparison much less than the 1994 Shopko TIA.

34. At Record 00615, Mr. Brown commented as follows: "Because the intersection of Professional Mall Boulevard at Bishop Boulevard cannot function with a Level of Service (LOS) better than F, and this will induce traffic accidents, it must be a signalized with a 2-Phase actuated signal and include a separate southbound right turn only lane." See also Record 00637.

35. Wal-Mart has agreed, and Site Plan approval has required that roadway stripping be modified to improve traffic flow at Professional Mall Boulevard and Bishop.

36. Testimony presented by the public, and much of the written record, suggests concerns relating to safety at the Bishop and Fairmont intersection and particularly resulting from its physical relationship to the Pullman Regional Hospital. Wal-Mart and the City agreed to the future installation of a traffic signal at that intersection and a stated level of compensation of 20 percent by Wal-Mart, contingent upon availability of other funding.

37. Wal-Mart's TIA (May, 2005), at Record 00243, states that the intersection (Bishop and Fairmont) will operate at LOS D, as an unsignalized intersection even with proposed stripping improvements.

38. Increased traffic attributable to Wal-Mart will result in failure of both identified intersections on Bishop Boulevard under any level of peak p.m. allocated trips. These intersections fail, or are at near failure, at the minimum levels suggested by Mr. Brown, the levels suggested in the DKS study, and the levels suggested in the May, 2005, TIA, unless signalization is provided. Record 00242. An LOS of D would exist at Bishop Boulevard and Fairmont with interim improvements proposed by Wal-Mart. A LOS of D at the intersection would be unsatisfactory and result in unsafe driving conditions. Both Wal-Mart and the City of Pullman are required to promote safe driving conditions at the time that Wal-Mart is opened. Perhaps others may ultimately share in the cost of signalization and the feasibility of a form of a "late comer agreement" should be explored.

Fiscal Impacts

39. Testimony presented suggested that businesses within the downtown area of Pullman would be harmed because of competition from Wal-Mart. Other testimony suggested that Wal-Mart would compete with only a limited number of downtown businesses. No credible testimony was presented that urban blight would befall the City's downtown area as a result of the proposal.

40. Testimony was presented regarding a lack of social responsibility of Wal-Mart to the communities, and jurisdictions in which they locate. Suggestions of increased crime, the intrusion of undesirable social classes, low wages, failure to provide medical benefits, were presented in great detail. Testimony was also presented that Wal-Mart would provide jobs, business opportunity and lower prices for the goods they sell and which would have a positive impact on Pullman and its citizens.

41. An increase in tax revenues will be available to the City, Whitman County, and the State of Washington.

Light and Glare

42. Light and glare are elements of review under SEPA process. Expert testimony was introduced suggesting that exterior lighting would be more than detrimental to citizens residing in the area. Alternative means of exterior lighting was suggested and may well have merit. The proposal is in an urban area adjacent

to other commercial uses and Wal-Mart has satisfactorily taken steps to mitigate the impact of a reasonable use of their property which is deemed important for purposes of the general health, welfare and safety.

Cemetery

43. The Pullman Cemetery, located immediately south of the proposal, offers an idyllic and peaceful setting. It has cultural value and provides a scenic vista when viewed from a distance. Gravesites are located entirely within its boundaries and no evidence suggests that graves historically associated with the cemetery would be disrupted on the property of Wal-Mart.

44. Wal-Mart has mitigated potential adverse impacts by agreeing to landscape with visual buffers and to a certain extent has designed the site and road system to mitigate impact on the cemetery. Wal-Mart is without legal ability to remove existing trees within the cemetery site.

45. The cemetery is also zoned General Commercial (C-3).

46. Wal-Mart has agreed to abate construction pending additional government approval in the event that items of cultural, historical or archeological significance is found. The Hearing Examiner extends this list, and such is implied, to include any graves or human remains found on the Wal-Mart property.

Surface Water Runoff

47. The proposal will produce surface water runoff and require drainage associated with roads, roofs, and parking surfaces. Wal-Mart has devised engineering plans for containment and dispersal which comply with existing laws of the City of Pullman. Although expert testimony was introduced stating impacts from surface runoff, the plans comply in all respects with the existing laws of the City of Pullman and pertinent laws and regulations of the State of Washington.

Other Conditions

48. Other elements of SEPA review, and other conditions relating to Site Plan review were identified. Any element or condition not specifically identified herein, is considered de minimus, and not sufficient to require further compliance with SEPA or is significant to Site Plan approval under the existing ordinances of the City of Pullman.

III. CONCLUSIONS OF LAW

1. An owner of land has the ability to utilize his property in a reasonable manner and when such use does not violate reasonable laws regarding its use.
2. The laws of other jurisdictions in which Wal-Mart does business vary significantly from the laws of the City of Pullman and the State of Washington. That unless a specific condition is authorized by law it cannot be required of Wal-Mart either because Wal-Mart has done so in the past or that such may be a good idea or required by another jurisdiction.
3. The application of October 28, 2004, is sufficiently complete to be considered vested under Washington law. Changes in land use laws made after said date would not be applicable to the proposal with the exception of the proposed gas station.
4. The laws of the State of Washington (RCW 36.70B.050) require that a single public hearing be held in connection with the proposal.
5. Trip generation based on the TIA prepared for the City of Pullman are not directly supported by the DKS Associates Study and which suggests generally that trip generation will not be greater than those suggested in the model utilized by the City of Pullman TIA particularly when it is unknown whether the subjects of DKS study include free-standing gas stations and the study was conducted during the month of February.

6. The TIA prepared by Wal-Mart may understate the number of vehicle trips generated by its proposal to an unknown extent but which information is more likely known to Wal-Mart, but which is claimed as proprietary information. The decision to construct the proposal at its current location would necessarily include information from which anticipated traffic impacts could be more accurately identified with additional information known to Wal-Mart rather than to be based on standards utilized nationally. Local modifications of traffic standards used nationally are recognized.
7. The TIA identifies two intersections which are likely to fail at any level of service suggested by even the lowest suggested trip generation levels, which require further mitigation or the imposition of additional conditions, as follows:
 - A. The intersection of Bishop Boulevard and Professional Mall Boulevard, with the participation of the Wal-Mart to an extent to be determined by the Public Works Director, must be improved with a 2-phase actuated signal and separate right turn only lanes, as referenced in Finding of Fact No. 34, must be operational prior to permit approval of a free-standing gasoline station on the site. Alternatively, if a new TIA is completed by Wal-Mart following construction of the supercenter and demonstrating Levels of Service to be acceptable, as determined by the Public Works Director. These improvements may not be required. The existing condition for this intersection of modified stripping remains as a required condition of the proposal.

- B. The traffic signal at Bishop Boulevard and Fairmont, with the participation of Wal-Mart, shall be operational prior to a certificate of occupancy being issued for the proposal. Any contingency regarding funding of the improvement is deleted and completion of the signalization is a required condition of approval. The level of participation of 20% by Wal-Mart is not proportional to the impact to that intersection caused by the proposal. The Public Works Directory may determine the level of participation of Wal-Mart recognizing that the road system of the City of Pullman, and other property owners, may be potentially benefitted. This condition further recognizes that signalization will promote a safer intersection.

Both condition A and B, above-identified, are directly related to traffic impacts resulting from the construction of the supercenter. These impacts relate both to SEPA and Site Plan approval.

8. Wal-Mart is required by law to include future development of its site as a part of SEPA review. As to review under SEPA the gas station is approved as mitigated in the preceding paragraph No. 7. However, no approval is given under the Design Standards of the City of Pullman for Site Plan review and the permitting of a gas station is not vested at this time under the zoning code as the application is not complete as to the proposed gas station.
9. Economic impact is not, in and of itself, an element of the environment under SEPA. Indian Trail Prop. Ass'n v. Spokane, 76 Wn. App. 430, 444, 886 P.2d 209 (1994). No credible evidence exists to suggest that urban blight will result from approval of the proposal under SEPA. The mere suggestion of such does not establish a significant environmental concern requiring preparation of a Final Impact Analysis under SEPA or a fiscal impact analysis.
10. Although Wal-Mart may heed the advice of utilizing alternative exterior lights they cannot be compelled to do so. The selected exterior lighting is a personal choice and one which is not otherwise regulated by the City of Pullman. The exterior lighting scheme sufficiently mitigates any environmental harm requiring further mitigation or

additional study. The proposed lighting plan does not arise to a level adversely affecting the environment within an urbanized area particularly when reasonable effort has been made to reduce fugitive light.

11. Wal-Mart has mitigated impacts of its proposal on the Pullman Cemetery. In the event that human remains are disturbed, the Applicant's construction effort will be abated in that area for a governmental determination of a course of action.
12. Typically, zoning is designed to prevent the discordant uses of land. The City of Pullman has chosen to zone both Wal-Mart's land and the cemetery as General Commercial (C-3). Each land use has the absolute right to co-exist under the laws of City of Pullman particularly when the impacts of both upon the other have been reasonably mitigated.
13. Because of the sensitivity over the cemetery existence in relation to the proposal Wal-Mart might well seek further mitigation of the impacts from its business operations. However, nothing under the law may compel them to do so or to make further concessions with regard thereto.
14. As mitigated the proposal does not result in a significant environmental impact requiring the preparation of an Environmental Impact Statement and the DNS is approved.
15. Except as conditioned hereby, the Site Plan as approved by the Public Work's Director complies with the 2001 Design Standards for the City of Pullman.
16. The proposal complies with other laws of the City of Pullman including generally its Comprehensive Plan.

III. DECISION

Based on the Findings of Fact and Conclusions of Law above, the application for a Wal-Mart Supercenter is hereby *approved*, subject to the conditions stated herein, and specifically Conclusions of Law 7A, 7B, and 11, to include Findings of Fact 46. In all other respects the proposal is approved as conditioned previously by the City of Pullman and which conditions are binding upon Wal-Mart, the applicant, and their successors.

Based on the Findings of Fact and Conclusions of Law above, the appeal filed by the Pullman Alliance for Responsible Development of the (DNS) issued for the proposal is hereby *denied*, the application of Wal-Mart having been further mitigated to include additional conditions. No Environmental Impact Statement is required of this proposal or in the future for a free-standing gasoline station considered herein.

The appeal of the Site Plan approval is granted in part as to traffic conditions imposed by this decision, and in the event that human remains be discovered on site. In all other respects, even and though not specifically identified, the site plan appeal is *denied*.

Failure to comply with the conditions of this approval may result in revocation of this approval by the City of Pullman. This approval does not waive the applicant's obligation to comply with all other requirements of other public agencies with jurisdiction over land development and future activities conducted on the property.

DATED this 24th day February, 2006.

CITY OF PULLMAN
HEARING EXAMINER

By:


JOHN MONTGOMERY, WSBA #7485

IV. NOTICE OF FINAL DECISION AND NOTICE OF RIGHT TO APPEAL

The decision of the Hearing Examiner on this appeal is final and conclusive unless within twenty-one (21) calendar days from the issuance of the Examiner's decision, a party with standing files a land use petition in superior court pursuant to chapter 36.70C RCW. Pursuant to chapter 36.70C RCW, the date of the issuance of the Hearing Examiner's decision is three (3) days after it is mailed.

The Decision was mailed by certified mail to the Applicant, and Appellant, on February 24, 2006. The date of issuance of the Hearing Examiner's decision is therefore February 24, 2006. **THE LAST DAY FOR APPEAL OF THIS DECISION TO SUPERIOR COURT BY LAND USE PETITION IS MARCH 20, 2006.**

The complete record in this matter, including this decision, is on file during the appeal period with the Clerk, City of Pullman. The file may be inspected during normal working hours, listed as Monday-Friday of each week, except holidays, between the hours of 8:30 a.m and 5:00 p.m. Copies of the documents in the record will be made available at the cost set by the City of Pullman.

Pursuant to RCW 36.70B.130, affected property owners may request a change in valuation for property tax purposes notwithstanding any program of revaluation.

V. CERTIFIED MAILING

I, the undersigned, did deposit into the United States Mail Service a true and correct copy of FINDINGS OF FACT AND CONCLUSIONS OF LAW AND DECISION, Certified Mail, postage pre-paid to the following persons:

Pullman Alliance for Responsible Development
c/o Brian T. McGinn, Attorney
601 West Riverside, Ste. 1900
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DATED this 27 day of February, 2006.


KAREN L. ALLRED